FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 94-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,

Petitioner,

v.

BEN MYRICK and EMILY MYRICK,

Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Petitioner,

v.

JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JAMES E. CARTER
(Counsel of Record)
RAYMOND T. BROOKS, JR.
THE CARTER FIRM
P.O. Box 509
Madison, Georgia 30650
(706) 342-4722

CHARLES A. MATHIS, JR.
MATHIS, JORDAN AND ADAMS, P.C.
425 South Wayne Street
Milledgeville, GA 31061
(912) 453-9387

ALLAN R. ROFFMAN
LAMBERT AND ROFFMAN
P.O. Box 169
Madison, Georgia 30650
(706) 342-3566

Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3286

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Court of Appeals err in holding that the National Traffic and Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standard 121 promulgated thereunder do not preempt Respondent's common law claims of defective brake design when:

(a) the Safety Act does not explicitly state that common law tort claims are preempted, and

(b) the Safety Act expressly saves common law liability claims.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
A. Federal Law Background	3
B. Statement of Facts	8
REASONS FOR DENYING THE PETITION	9
A. There Is No Conflict Among the Courts Justifying Supreme Court Review	11
B. The Court of Appeals Correctly Held that Respondents' Claims Are Not Preempted	14
C. Respondents' Common Law Claims Do Not Conflict With the Safety Act Nor With Standard 121	21
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:

Abbott v. American Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988)	24
Arbet v. Gussarson, 66 Wis.2d 551, 225 N.W.2d 431 (Wis. 1975)	12
Boyle v. Chrysler Corp., 501 N.W.2d 4565 (Wis. Ct. App. 1993)	13
Buccery v. General Motors Corp., 60 Cal. App. 3d 553, 132 Cal. Rptr. 605 (Cal. App. 1976)	11
Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3rd Cir. 1992)	12, 24
Byrnes v. Honda Motor Co., Ltd., 845 F.Supp. 875 (S.D. Fla.)	14
Chicago & N.W. Transp. Co. v. Kalo Brick and Tile Co., 450 U.S. 311 (1981)	16, 17

Cases, continued:

	Page
Chrysler v. DOT, 472 F.2d 659 (6th Cir. 1972)	11
Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608 (1992)	*passim*
Constant v. Kawasaki Motors Corp., 845 F.Supp. 170 (M.D. Fla. 1994)	14
CSX Transportation, Inc. v. Easterwood, 113 S.Ct. 1732 (1993)	15, 19
Dawson v. Chrysler Corp., 630 F.2d 950 (3rd Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)	11
Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982)	11
Estate of Montag v. Honda Motor Co., 1994 WL 323650 (D.Colo. 1994)	13
Ferebee v. Chevron Chemical Co., 736 F.2d 1539 (D.C. Cir. 1984)	24, 25
Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978)	11
General Motors Corporation v. Edwards, 482 So.2d 1176 (Ala. 1985)	11
Gade v. National Solid Wastes Management Ass'n, 112 S.Ct. 2374 (1992)	22, 23, 25
Gills v. Ford Motor Co., 829 F.Supp. 894 (W.D.Ky. 1993)	13
Gingold v. Andu-NSU – Auto Union, 567 A.2d 312 (Pa. Super Ct. 1989)	22, 23
H.P. Hood & Sons, Inc. v. Ford Motor Co., 370 Mass. 69, 345 N.E.2d 683 (Mass. 1976)	11
Harris v. Ford Motor Co., No. 93-5248 (C.D. Cal. Aug. 22, 1994)	14
Hubbard-Hall Chemical Co. v. Siverman, 340 F.2d 402 (1st Cir. 1965)	25
International Paper Co. v. Ouellette, 479 UlS. 481 (1987)	16, 17

Cases, continued: **Page**

Jackson v. Spagnola, 349 Pa. Super. 471, 503 A.2d 944 (Pa. Super. 1986) 11

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S.Ct. 517 (1993) 22, 23

Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 12, 14

Knippen v. Ford Motor Co., 178 U.S. App. D.C. 227, 546 F.2d 993 (D.C. Cir. 1976) 11

Larson v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) 11, 21, 22

Lollie v. General Motors Corp., 407 So.2d 613 (Fla. App. 1981) 11

Loulos v. Dick Smith Ford, Inc., 1994 WL 226676 (Mo. App. 1994) 14

Marrs v. Ford Motor Co., 852 S.W.2d 570 (Tex. Ct. App. 1993) 13

McMullen v. Volkswagen of America, 274 Or. 83, 545 P.2d 117 (Ore. 1976) 11

Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insur. Co., 463 U.S. 29 (1980) 8

Paccar, Inc. v. National Highway Traffic Safety Admin., 573 F.2d 632 (9th Cir.), cert. denied, 439 U.S. 862 (1978) 5, 6, 7, 8

Papas v. Upjohn Co., 985 F.2d 516 (11th Cir. 1993) (*Papas II*), *cert. denied*, 1145 S.Ct. 300 (1993) 15

Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991) (*Papas I*) 14

Papas v. Zoecon Corp., 112 S.Ct. 3020 (1992) 15

Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121 (1915) 16

Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992) 12, 22

Cases, continued: **Page**

Pokorney v. Ford Motor Co., 902 F.2d 116 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990) 12, 13

Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291 (11th Cir. 1993) 14, 15, 26

Raymond v. Riegal Textile Corporation, 484 F.2d 1025 (1st Cir. 1973) 25

Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (Colo. App. 1978) 11

Schwartz v. American Honda Motor Co., Inc., 710 F.2d 378 (7th Cir. 1983) 11

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984) 17, 25

Sours v. General Motors Corp., 717 F.2d 1511 (6th Cir. 1983) 11

Stonehocker v. General Motors Corp., 587 F.2d 151 (4th Cir. 1978) 11

Shipp v. General Motors, 750 F.2d 418 (5th Cir. 1985) 11

Tammen v. General Motors Corp., 1994 WL 383518 (D.Kan. 1994) 13, 14

Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) . . . . . *passim*

Texas and Pac. Ry. v. Abilene Colton Oil Co., 204 U.S. 426 (1907) 16

Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974) 12

United States v. General Motors Corp., 171 U.S. App. D.C. 27,518 F.2d 420 (D.C. Cir. 1975) 11

Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (Md. App. 1974) 11

Welsh v. Century Products, 745 F.Supp. 313, 318-19 (D.Md. 1990) 24

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) 12, 15, 20, 21

Page

Statutes:

National Traffic and Motor Vehicle Safety Act,
15 U.S.C. §§1381 23
§1391(2) 3, 18
§1392(a) 3
§1392(d) 4, 10, 13, 18, 19, 20
§1397(a)(1)(A) 3
§1397(k) 4, 19
§1403 3

29 U.S.C. §1144(c)(1) 17

29 U.S.C. §2074 25

Regulatory Materials:

49 C.F.R. §571.121 (Standard 121) 5, 26, 27

49 C.F.R. §571.121 S2 5

49 C.F.R. §571.121 S3 7

49 C.F.R. §571.121 S4 27

35 Fed. Reg. 10,368 (1970) 5

35 Fed. Reg. 10,456 (1970) 5

44 Fed. Reg. 46,849 (1979) 7, 8

57 Fed. Reg. 24,212 (1992) 6, 8

Other Materials:

National Highway Transportation Safety Admin. (NHTSA) 3, 5, 6, 7

Note, *Automobile Passive Restraint Claims Post Cipollone: An End to the Federal Preemtion Defense*, 46 Baylor L.Rev. 141 (1994) 18, 21

S. Rep. No. 1301, 89th Cong. 2d Sess. 12 (1966) 19

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) 20

Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ("Safety Act Hearings"), 89th Cong., 2d Sess. Part 2, 1249 (1966) 20

No. 94-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,

Petitioner,

v.

BEN MYRICK and EMILY MYRICK,

Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Petitioner,

v.

JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ben and Emily Myrick and Jack Lindsey, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners Freightliner Corporation and Navistar International Transportation Corporation, because applicable law has settled the

issue. Based on this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), and on part of its own decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), the Eleventh Circuit held that the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381-1431, does not preempt Respondents' common law claims.

STATEMENT OF THE CASE

Relying on *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), and the interpretation of that decision by at least eight of its sister circuits, a majority panel of the court of appeals held that Respondents' common law claims of defective brake design based upon the absence of antilock brakes, were not preempted by the National Traffic and Motor Vehicle Safety Act, i.e. that Congress did not intend to preempt these claims by enactment of the Safety Act. In *Taylor v. General Motor Corp.*, 875 F.2d 816 (11th Cir. 1990) *cert. denied*, 494 U.S. 1065 (1990), the Eleventh Circuit had previously held that, although the Safety Act did not expressly preempt plaintiff's common law "no airbag" claim, the act impliedly preempted it. The court of appeals reached its decision by applying the clear guidelines of *Cipollone*. Superimposing the *Cipollone* decision over the *Taylor* decision, the court found that the implied preemption part of *Taylor* was superseded by *Cipollone's* clear instruction that "when there is an express preemption provision we should not consider implied preemption." Pet. App. 11a. Since the express preemption analysis of *Taylor* was unaffected by *Cipollone*, the court determined that "[f]actoring *Cipollone* into *Taylor* produces a net result of no pre-emption in this case." Pet. App. 11a.

A. Federal Law Background

The National Traffic and Motor Vehicle Safety Act was enacted due to Congressional concern over the rising highway accident rate, the loss of lives and property due to accidents, and the tendency of the automobile industry to concentrate on cosmetic design to the detriment of safety design. This is evidenced by the Act's congressional declaration of purpose: "Congress hereby declares that the purpose of this Act is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. §1381. (For consistency, we also cite to the codification used in the courts below and in all the opinions on the issue).

Pursuant to the authority of the Safety Act, the National Highway Transportation Safety Administration (NHTSA) establishes federal motor vehicle safety standards. *Id.* §1392(a). These standards are minimum standards for motor vehicle performance, or motor vehicle equipment performance. *Id.* §1391(2). The standards do not dictate to manufacturers how to design their vehicles or vehicle equipment. The manufacturers have discretion as to the design which will be used to meet the performance criteria. Manufacturers must certify compliance with the performance requirements in order to sell their vehicles and equipment. *Id.* §§1397-(a)(1)(A) and §1403. The Safety Act simply determines whether or not a vehicle can legally be sold in the United States.

The Safety Act contains two provisions which explicitly state Congress' intention with regard to state law. The first provision, which is referred to as the "preemption provision" states:

> **Supremacy of federal standards; allowable higher standards for vehicles used by Federal or State governments.** Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

Id. §1392(d). The other provision is called the "savings clause" and it provides:

> **Continuation of common law liability.** Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Id. §1397(k). The plain language of these provisions demonstrate a Congressional intent to exclude only non-identical state motor vehicle standards covering the same aspect of performance as a federal standard, while preserving state regulations where there is no federal regulation in effect, or where the state standard is identical to the federal standard, or where the state regulations

apply to a different aspect of performance than the federal standard, or where state government vehicles are involved. The provisions clearly show that Congress did not intend to preempt common law liability. The fact that state governments could require more stringent safety standards in vehicles for its own use shows that the standards were not intended to be exhaustive, but that they were indeed minimum standards.

The NHTSA regulations governing the performance of truck air brakes are set forth at 49 C.F.R. §571.121 (Standard 121). The purpose of Standard 121 is "to insure safe braking performance under normal and emergency conditions." 49 C.F.R. §571.121 S2. Part 121 was the subject of a lawsuit in the 1970's. The standard required "vehicles to stop within certain distances, from certain speeds, without leaving a 12-foot wide lane, and without lockup of any wheel more than momentarily." *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 636 (9th Cir.), *citing* 35 Fed. Reg. 10,368 (1970) (trucks and buses) and 35 Fed. Reg. 10,456 (1970) (trailers), *cert. denied*, 439 U.S. 862 (1978). The *Paccar* court found that antilock brakes were necessary to meet the standard. *Paccar*, 573 F.2d at 639 n.26.[1] The standard had been amended numerous times,

---

[1]The *Paccar* court's finding that the regulation effectively required a manufacturer to equip its trucks with antilock brake systems does not alter the fact that the standard sets performance criteria leaving to the manufacturers the choice of appropriate brake system designs.

The agency has recently explained the functioning and history of antilock brake systems (ABS) in a comprehensive notice of proposed rulemaking:

> . . . Heavy vehicles are typically designed to achieve their best braking performance when operating in the fully loaded condition. Accordingly, a vehicle with a brake system

[footnote continued]

particularly in regard to increasing stopping distances. These amendments were the result of industry protestations. Eventually, the industry challenged the regulation, and the Ninth Circuit found that, although NHTSA was justified in promulgating a standard requiring improved air brake systems and stability mechanisms for the industry, because of unforeseen problems in mass production the standard was "neither reasonable nor practicable *at the time it was put into effect.*" *Paccar,* 573 F.2d at 640. (Emphasis added). The court ordered NHTSA to suspend the antilock requirement of the standard. *Id.* at 643. However, the court's decision was not based on a finding that the antilock requirement was unsafe; rather, the decision was based on NHTSA's failure

---

designed to operate ideally in the full loaded condition has a tendency to lockup one or more of its axles prematurely (i.e., one axle will lockup before other axles achieve maximum braking) when operating in the lightly loaded conditions, especially when operating on slippery roads.

. . .

ABS helps prevent loss of control situations by automatically controlling the amount of braking pressure applied to a wheel. . . . When operating at loads significantly below the fully loaded condition or on slippery road conditions, vehicles equipped with ABS usually obtain shorter stops because braking efficiency is enhanced.

. . .

Development work on ABS for heavy vehicles began in the 1950s with commercial products available in the late 1960s. . . . As a result of these requirements [of Standard 121], approximately one million air-braked trucks, buses, and trailers were equipped with ABS in the late 1970s.

. . .

Nevertheless, the data, although imperfect, indicates that brake induced instability is a significant contributing factor to truck crashes.

57 Fed. Reg. 24212; 24214 (1992).

to present evidence that the results of its rulemaking on vehicles in use did not create a greater danger to the public. *Id.* at 642-43.

After the *Paccar* decision, NHTSA made several attempts to explain its interpretation of the case and finally amended the standard to exempt trucks and trailers from the antilock and related requirements. *See* 44 Fed. Reg. 46,849 (1979). The "application provisions" of the standard state that "[t]his standard applies to trucks, buses and trailers equipped with air brake systems." The amendment added the following:

> Notwithstanding any language to the contrary, sections S5.3.1, S5.3.1.1, S5.3.2, S5.3.2.1, S5.3.2.2, S5.7.1, S5.7.3(a) and S5.7.3(b) of this standard are not applicable to trucks and trailers . . .

49 C.F.R. §571.121 S3.

The amendment to the standard was *not* a deliberate choice by the agency not to require antilock brakes for trucks on the basis of safety and practicability as Petitioners contend. The agency explained its actions:

> The agency is amending the application section of the standard to state that trucks and trailers need not comply with certain paragraphs of the regulation. The regulation is being amended in this manner rather than deleting or revising the wording of each of the affected sections in order to disturb the actual test of the standard as little as possible. In that way, the affected sections can most easily be reinstated when suitable solutions to the requirements laid down by the Court are found. In addition, *by retaining the standard's language in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimal acceptable performance, and those manufacturers that wish to construct their vehicles in*

accordance with the non-mandatory sections of the standard will have the necessary guidance to do so.

44 Fed. Reg. 46,849 (1979). (Emphasis added).

After *Paccar,* U.S. manufacturers chose to halt development and production of antilock brake systems on heavy vehicles. 57 Fed. Reg. 24,212, 24,213 (1992).[2]

B. Statement Of Facts

On February 6, 1989, a tractor-trailer was southbound on a wet highway in Morgan County, Georgia. The driver applied the brakes because of traffic ahead. The brakes locked and caused a jackknife whereby the trailer skidded into the path of a northbound tractor-trailer driven by Respondent Ben Myrick. The impact tore the cab off Mr. Myrick's rig. Mr. Myrick suffered closed head injuries, abdominal injuries, and spinal injuries; he is permanently paraplegic and brain damaged. His wife, Respondent Emily Myrick has lost the companionship and consortium of her husband. Neither the tractor nor the trailer that collided with Mr. Myrick's vehicle had antilock braking devices.

The tractor-trailer rig that jackknifed into the path of Grace Lindsey had no antilock devices either. On September 5, 1989, the rig was proceeding south on a highway in Oconee County, Georgia, when the driver applied the brakes because of a car stopped in front of it. Mrs.

[2]The industry's attitude toward the implementation of this safety feature mirrors the automobile industry's "war against the airbag." *See Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 48-50 (1980). The truck manufacturers won a major battle with their victory in *Paccar,* and are now attempting to win the war on the common law front. The irony that the manufacturers are relying on "no airbag" cases for their ammunition should not be lost on the Court.

Lindsey, who was driving northbound, was killed by the jackknifing tractor as it crossed into her lane of travel. Respondent Jack Lindsey is her surviving spouse.

REASONS FOR DENYING THE PETITION

For the first twenty years after the enactment of the Safety Act, the courts were virtually unanimous in holding that various common law claims were not preempted by the Safety Act. The courts uniformly rejected the manufacturers' argument that when they have complied with an applicable federal motor vehicle safety standard, they cannot be held liable for failing to do more. Rejecting the reasoning of courts which found preemption, (almost exclusively in airbag claims and by implied preemption), the Eleventh Circuit, under the guidelines of *Cipollone,* simply made a correct analysis of preemption under the Safety Act. While there may be some residual conflict among the district courts until their respective circuits courts decide post-*Cipollone* Safety Act cases, conflict between courts with regard to the Safety Act has always been allowed by this Court.

In following this Court's mandate from *Cipollone,* that the existence of an express preemption provision precludes implied preemption analysis, the court of appeals did not simply rely on its reading of one passage from the decision as Petitioners contend. The court examined how the other circuits had applied *Cipollone,* how this Court dealt with preemption post-*Cipollone,* and how cases decided by other panels within the Eleventh Circuit had been affected. Faced with these sources, the court made the only determination that it could – the Supreme Court meant what it said in *Cipollone.*

In factoring *Cipollone* into *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert denied,*

494 U.S. 1065 (1990), and determining that there is no preemption in this case, the court did not rely solely on the existence of the savings clause. Concerned with what Congress expressly stated about preemption, the court found that Congress had expressed its intent about preemption in both the preemption clause and the savings clause. These "clauses explicitly deal with what is and is not preempted." Pet. App. 21a. Congress has explicitly spoken with regard to preemption; thus, there is no need to infer congressional intent. In the portion of *Taylor* which was not affected by *Cipollone,* the court had already determined that the Safety Act does not expressly preempt common law claims, a finding consistent with the decisions of a vast majority of courts. That determination results from an express preemption analysis entirely consistent with this Court's federal preemption jurisprudence.

The language and legislative history of the Safety Act make it clear that Congress intended to preempt non-identical state motor vehicle safety standards. Common law damage claims, no matter what their regulatory effect, are not preempted. There is no federal/state conflict despite Petitioners' characterization of the common law claims in this case as regulations. Common law claims are not the "standards" that Congress is preempting in Section 1392(d), so there is no general conflict. Nor do the claims specifically conflict with the federal regulations where such regulations permit but do not require manufacturers to use certain designs.

A. There Is No Conflict Among the Courts Justifying Supreme Court Review.

Every federal and state appellate court to address the issue of preemption in the Act's first twenty years found that the Safety Act simply does not preempt common law claims. Beginning with *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the courts have concluded, outside of the context of passive restraints, that Congress did not intend to preempt common law claims. *See, e.g., Knippen v. Ford Motor Co.*, 178 U.S. App. D.C. 227, 546 F.2d 993, 1000 (D.C. Cir. 1976); *United States v. General Motors Corp.*, 171 U.S. App. D.C. 27,518 F.2d 420, 434 (D.C. Cir. 1975); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3rd Cir. 1980) *cert. denied,* 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Shipp v. General Motors,* 750 F.2d 418, 421 (5th Cir. 1985); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981) *cert. denied,* 459 U.S. 880 (1982); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Chrysler v. DOT,* 472 F.2d 659, 670 n.13 (6th Cir. 1972); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Fox v. Ford Motor Co.*, 575 F.2d 774, 784 (10th Cir. 1978); *General Motors Corporation v. Edwards,* 482 So.2d 1176, 1198 (Ala. 1985); *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 553, 132 Cal Rptr. 605, 609 (Cal. App. 1976); *Roberts v. May,* 41 Colo. App. 82, 583 P.2d 305, 308 (Colo. App. 1978); *Lollie v. General Motors Corp.*, 407 So.2d 613, 617 (Fla. App. 1981); *Volkswagen of America, Inc. v. Young,* 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (Mass. 1976); *McMullen v. Volkswagen of America,* 274 Or. 83, 545 P.2d 117, 120 (Ore. 1976); *Jackson v. Spagnola,*

349 Pa. Super. 471, 503 A.2d 944, 948 (Pa. Super. 1986); *Turner v. General Motor Corp.*, 514 S.W.2d 497, 505-06 (Tex. Civ. App. 1974); *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (Wis. 1975).[3]

Three circuits have held that "no-airbag" claims are preempted, all under an implied preemption analysis. *See Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied* 494 U.S. 1065 (1990); *Pokorney v. Ford Motor Co.*, 902 F.2d 116 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990).[4] The Eleventh Circuit had also determined that "no-airbag" claims were preempted. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). Despite the conflict between these recent cases and those cases previously decided, this Court did not grant certiorari. Petitioners present no reason for the Court to abandon its understanding of conflicts between courts with regard to preemption under the Safety Act.

Furthermore, since the court of appeals' decision is based on the *Cipollone* rule that the existence of express preemption provisions precludes implied preemption, there is no longer any valid conflict among those circuit decisions (*Wood*, *Kitt*, and *Pokorny*) which were decided prior to *Cipollone*. Those decisions relied on an implied

---

[3] While some of these cases do not use the word "preemption," it is clear that the preemption issue, compliance with federal safety standards as dispositive of liability issues, is being addressed.

[4] Despite these decisions, the circuit courts have adhered to a no preemption determination in cases not involving "no airbag" claims, *See Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992); *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3rd Cir. 1992).

preemption analysis, an analysis which is no longer valid under *Cipollone*, because of the Safety Act's explicit preemption provisions. Since these courts have all previously determined that the Safety Act did not expressly preempt common law claims, if they properly follow *Cipollone*, they should reach the same conclusion as the Eleventh Circuit. For them to rule otherwise would be inconsistent with their findings of no express preemption. This is especially true with regard to the Third Circuit, since *Cipollone* reversed a decision of the Third Circuit which had employed the same preemption analysis used in *Pokorny*.

The lower court decisions finding preemption since *Cipollone*, cited by Petitioners, should not influence this Court's decision on whether to grant the petition. Two of the cases, *Gills v. Ford Motor Co.*, 829 F.Supp. 894 (W.D.Ky. 1993) and *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993), do not even discuss *Cipollone*. The *state* court in *Boyle v. Chrysler Corp.*, 501 N.W.2d 565 (Wis. Ct. App. 1993), incorrectly concluded that Section 1392(d) included tort claims. The court in *Estate of Montag v. Honda Motor Co.*, 1994 WL 323650 (D.Colo. 1994), follows the present case in limiting its analysis to express preemption but then finds the "no airbag" claim expressly preempted, a decision in clear conflict with all prior Safety Act cases, even those that found preemption. Without any analysis, the court concluded that the common law claim constituted a nonidentical "safety standard," and improperly attributed to the savings clause a function already carried out by the preemption clause. *See Taylor*, 875 F.2d at 824 ("the preemption clause itself provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state standard is not preempted"). The district court in *Tammen v.*

General Motors Corp., 1994 WL 383158 (D.Kan. 1994), merely deferred to the appellate court: "If *Cipollone* overrules *Kitts*, it is up to the Tenth Circuit to say so."[5] No conflicts requiring Supreme Court review exist among the lower courts.

B. The Court of Appeals Correctly Held that Respondents' Claims Are Not Preempted

The Court of Appeals interpreted *Cipollone* to hold that where a federal statute contains an express preemption clause which provides a reliable indicium of congressional intent with respect to state authority, a court should not consider implied theories of preemption. Pet. App. 9a-10a, *citing Cipollone*, 112 S.Ct. at 2618. In support of this interpretation, the court found that at least eight of its sister circuits had reached the same conclusion with regard to the meaning of *Cipollone*. Pet. App. 11a-12a.

The court also found supports for its interpretation in the decisions of two other Eleventh Circuit panels. *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991) (*Papas I*) and *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). In *Papas I*, the Federal Insecticide, Fungicide, and Rodenticide Act was held to impliedly preempt certain claims. The Supreme Court vacated and remanded that decision for further consideration

[5] For district court cases relying on *Cipollone* and the present case and finding no preemption, *see Loulos v. Dick Smith Ford, Inc.*, 1994 WL 226676 (Mo. App. 1994); *Harris v. Ford Motor Co.*, No. 93-5248 (C.D. Cal. Aug. 22, 1994); *Byrnes v. Honda Motor Co. Ltd.*, 845 F.Supp. 875 (S.D. Fla.) (court had already denied defendant's motion but issued amended order reanalyzing decision in light of *Myrick*); *Constant v. Kawasaki Motors Corp.*, 845 F.Supp. 170 (M.D.Fla. 1994).

in light of its *Cipollone* decision. *Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992). On remand, the case was decided solely on express preemption grounds. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (*Papas II*). Pet. App. 12a-13a. In *Lake Aircraft*, the district court's finding of implied preemption was reversed. Citing *Cipollone*, the court held that the Federal Aviation Act and its aircraft design standard regulations did not preempt a state common law action for the negligent or defective design of an aircraft, even though the aircraft complied with federal standards. Pet. App. 13a.

Further support for respondents is found in this Court's post *Cipollone* preemption decision, *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993). The *Easterwood* Court rejected petitioner's claim of implied "conflict" preemption and did not conduct a separate implied preemption analysis where the common law claim for absence of warning devices at grade crossings was not barred under the explicit preemption provision of the Federal Railroad Safety Act. Pet. App. 16a-17a.[6]

Petitioners incorrectly argue that the *Cipollone* rule is inapplicable to the Safety Act. Citing *Wood*, 865 F.2d at 414, Petitioners contend the First Circuit assumed the validity of the principle of no implied preemption, but found it inapplicable to the Safety Act. This is not accurate. The *Wood* court discussed the "principle" that a savings clause precludes implied preemption analysis; however, this "principle," is neither the principle established by *Cipollone*, nor the one relied on by the

[6] The Eleventh Circuit's interpretation of *Cipollone* is also consistent with the interpretation attributed to the majority opinion by the dissent. See *Cipollone*, 112 S.Ct. at 2633. (Scalia, J. dissenting in part).

Eleventh Circuit. The Eleventh Circuit found that the Safety Act contained a preemption clause and a savings clause, which provided a reliable indicium of what Congress intended to preempt. Pet. App. 21a.

Petitioners also contend that a general savings clause does not save common law claims which are inconsistent with the act. The cases cited in support of this proposition are *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick and Tile Co.,* 450 U.S. 311 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.,* 237 U.S. 121 (1915); and *Texas and Pac. Ry. v. Abilene Colton Oil Co.,* 204 U.S. 426 (1907). Those cases are distinguishable from this case. For example, *Ouellette* involved the 1972 amendment to the Clean Water Act by which the Court found that Congress intended to "establish an all-encompassing program of water pollution regulation" and that "congressional views on the comprehensive nature of the legislation were practically universal." 479 U.S. at 492. The cases of *Kalo Brick, Puritan Coal,* and *Abilene Oil* all concerned the Interstate Commerce Act, "among the most pervasive and comprehensive of federal regulatory schemes." *Kalo Brick,* 450 U.S. at 318. The savings clauses in those acts were assigned the function of precluding "field" preemption, *Ouellette,* 479 U.S. at 492; *Kalo Brick,* 450 U.S. at 328; such a function would render the savings clause of the Safety Act superfluous, since the preemption clause in the Safety Act already precludes "field" preemption. Finally, these decisions were based on the fact that the common law claims were in direct, irreconcilable conflict with other provisions of the respective statutes.[7] In the present case, Petitioners

[7] Also important to the conclusion of preemption despite a savings clause in those cases was the fact that the aggrieved party [footnote continued]

do not cite to any provisions of the Safety Act which are directly and irreconcilably in conflict with Respondents' claims. The preemption clause in the Safety Act is silent as to common law claims.

To accept Petitioners' argument, the court must conclude that Congress intended the term "motor vehicle safety standard" to include common law claims. Such a conclusion does violence to the plain language of the Safety Act. The preemption provisions does not refer to common law or even "state law;" it mentions only action by a "State or political subdivision of a State." Clearly, Congress was restricting the ability of state legislative bodies to enact safety standards different from the federal standards, by seeking to obtain uniformity of government-imposed, mandatory regulations.[8] The term "standard," as it is used throughout the Safety Act, refers to positive enactments by legislatures and agencies. The phrases "safety standard" and "motor vehicle safety standard" are used interchangeably throughout the Safety Act. The Safety Act's express preemption clause provides:

had other remedies available. *Ouellette,* 479 U.S. at 497 (could bring a nuisance claim pursuant to law of source state); *Kalo Brick,* 450 U.S. at 331 (aggrieved shipper could pursue avenues of relief set forth in the statute).

If the claims in the present case are preempted, Respondents are left without a remedy. *See Silkwood v. Kerr-McGee,* 464 U.S. 238, 251 (1984) (It is "difficult to believe that Congress would remove all means of judicial recourse for injuries negligently caused by a manufacturer without comment or express language").

[8] Compare 29 U.S.C. §1144(c)(1), part of ERISA, where the "state law" which is preempted includes "all laws, decisions, rules, regulation, or other state action having the effect of law." This is the kind of language Congress uses when it intends to preempt common law claims, and it is provisions like this with which a general savings clause would be in conflict.

> Whenever a Federal motor vehicle *safety standard* established under this title is in effect, no State or political subdivision of a State shall have authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any *safety standard* applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. §1392(d) (emphasis added). The words "safety standard" mean the same thing both times those words are used in the above provision. The Act defines a safety standard as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practical, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. §1391(2). Petitioners have offered no explanation as to how a common law action establishes "a minimum standard . . . which provides objective criteria." Congress did not intend for common law actions to fall within the meaning of the term "safety standard" as used in the Safety Act's preemption clause.[9] Respondents' reading of the preemption clause is especially appropriate because of *Cipollone's* mandate that express preemption provisions be construed in light of the

---

[9] Read against the backdrop of nonuniform state regulations which existed in the early to mid-1960s when the Act was passed, the term "safety standard" most naturally refers to positive enactments by state legislators and rule-making bodies, not to common law damages actions.

Note, *Automobile Passive Restraint Claims Post Cipollone: An End to the Federal Preemption Defense.* 46 Baylor L.Rev. 141, 177 (1944). *See also* p. 177 n.219 (providing numerous examples of Safety Act provisions employing the term "standard").

presumption against the preemption of state police power. 112 S.Ct. at 2618-19, 2625-26. *See also Easterwood,* 113 S.Ct. at 1737 ("In the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption").

The fact that the preemption clause was not intended to preempt common law claims, and that the savings clause was meant to preserve such claims is further supported by the legislative history of the Safety Act. For example, the Senate's version of the proposed Safety Act did not contain Section 1397(k) [formerly §1397(c)], but did contain section 1392(d). Despite that fact, the Senate Committee Report made it clear that compliance with federal standards would not preempt common law claims. It stated:

> The federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law.

S.Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966). This was not sufficient for the House of Representatives, so it added Section 1397(c). Moreover, if the plain wording of that section leaves any doubts as to Congress' intent to preserve all common law claims, those doubts are surely resolved by the House Committee Report:

> *Common law liability*. – Section 108(c) of the reported bill [15 U.S.C. §1397(c)] provides that compliance with any federal motor vehicle safety standard does not exempt a person from any liability under common law.

> *It is intended,* and this subsection specifically establishes, *that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law* particularly those relating to *warranty,* contract, *and tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added.) The reason for the House of Representatives to add Section 1397(c), may be found in the Congressional testimony of Tom Tripleett of Chester, South Carolina:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded.

Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ("Safety Act Hearings"), 89th Cong., 2d Sess. Part 2, 1249 (1966).

Petitioners rely heavily on *Wood v. General Motors Corp.,* 865 F.2d 395 (1st Cir. 1988), *cert. denied,* 494 U.S. 1065 (1990), to support their argument that the present case was wrongly decided. The *Wood* court based its decision to preempt the "no airbag" claim on "the ambiguity created by section 1392(d) in combination with the savings clause, *combined with the paucity of design defect suits at the time the Safety Act was passed. Wood,* 865 F.2d at 416. The incorrect premise that Congress did not know about design defect claims in 1966, led the *Wood* court to conclude that Congress could not have intended for federal standards and "state design standards" to coexist. *Id.* at 403. By 1966, strict liability for design defects had made its way into the law. *See* 46 Baylor L.Rev. 141, *supra.* n.9, at 178 n.223 (listing pre-1966 sources which discuss strict liability for design defects). This flaw in the *Wood* court's analysis was recognized by the Eleventh Circuit in its express preemption analysis of *Taylor.* The *Taylor* court rejected the argument as unpersuasive. 875 F.2d at 825 ("[the doctrine established by *Larson*] did not emerge *ex nihilo*").

The Court of Appeals correctly interpreted and applied *Cipollone's* mandate to the present case and arrived at a decision consistent with the language and legislative history of the Safety Act. *Cipollone* and the present case have each followed reasoning which is the bedrock of federalism. There is no basis for further review by this Court.

C. Respondents' Common Law Claims Do Not Conflict With the Safety Act Nor With Standard 121

In their argument on "conflict" preemption, Petitioners argue that the Eleventh Circuit's reading of *Cipollone* is flawed. First, Petitioners contend that by relying on the first part of *Taylor* (Pet. App. 10a), the Eleventh Circuit necessarily decided that the brake claims herein are similar to "no airbag" claims, and that both are inconsistent with federal law under the Safety Act. This is

simply not accurate. The court simply reaffirmed its prior holding in *Taylor* that "the Safety Act does not expressly preempt common law liability for a safety defect that is addressed by a safety standard established under the Safety Act." Pet. App. 10a. This language does not show that the court recognized a conflict; instead, the court thereby recognized that Congress intended to limit positive regulatory enactments by states, but to allow federal regulation and state common law to coexist. *See* Pet. App. 22a ("For example, *a state legislative enactment* requiring action forbidden by a safety standard clearly would be preempted") (emphasis added). This conclusion has also been reached by other courts. *See, e.g., Larson,* 391 F.2d at 506 ("It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability"); *Gingold v. Audi-NSU-Auto Union,* 567 A.2d 312, 328-30 (Pa. Super. Ct. 1989) (finding state tort damage awards are consistent with and further the Act's principle purpose); *Perry,* 957 F.2d at 1265-66 ("Congress sought to meet its goal of minimizing the number of deaths and injuries caused by auto accidents by setting forth minimum standards and leaving common law liability in place").

Next, Petitioners cite *Gade v. National Solid Wastes Management Ass'n,* 112 S.Ct. 2374 (1992), and *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 114 S.Ct. 517 (1993), arguing that both before and after its *Cipollone* decision, the Court reaffirmed the applicability of "conflict" preemption analysis under a statute containing an explicit preemption provision and a broad savings clause. Neither of these cases involved a common law claim.

The *Gade* case concerned a declaratory judgment action seeking to enjoin the Illinois EPA from enforcing Illinois licensing acts for workers who handle hazardous waste on the basis that the acts were preempted by the OSH Act and OSHA regulations. 112 S.Ct. at 2381. Furthermore, the statute at issue did not involve a true express preemption clause. The plurality found that §18(a) of the act was a savings clause, not a preemption clause. Preemptive effect had to be implied from what the clause did not save. *Id.* at 2384. The Court, rejecting Justice Kennedy's finding that preemption is express, stated, "We cannot agree that the negative implications of the text . . . *expressly* address the issue of federal preemption of state law. We therefore prefer to place this case in the category of implied preemption." *Id.* at 2386 n.2 (emphasis in original).

The *John Hancock* case involved a suit brought pursuant to a *federal* statute, ERISA, by the trustee of a corporation's retirement plan to enforce ERISA's fiduciary standards against the administrator of the fund. 114 S.Ct. at 523. However, the state regulation in question was in direct, irreconcilable conflict with the ERISA provision which required fiduciaries to act solely in the interest of the participants and beneficiaries, so the savings clause could not save it. *Id.* at 525. Once again, Petitioners have not indicated any provisions of the Safety Act that irreconcilably conflict with Respondents' claims. There certainly is no provision which states that the ability of a manufacturer to choose any option under a federal motor vehicle safety standard shall not be curtailed by the common law, a provision Congress could have included if that were its intent. *See Gingold,* 567 A.2d at 325.

Conflict analysis is only appropriate where the state requires something that the federal government prohibits, or vice versa. The Safety Act does not prohibit common law claims. Congress' intent with regard to state common law actions is expressly stated in the language of the Safety Act. The preemption clause and the savings clause together provide "a reliable indicium of congressional intent with respect to state authority." Those provisions provide a scheme by which Congress intended federal regulation to coexist with common law to serve the ultimate goal of motor vehicle safety. Thus, Respondents' claims promote the Safety Act's ultimte goal of vehicle safety. Uniformity, which Petitioners contend to be compromised by the common law claims, is, at most, a subsidiary goal of the Safety Act – not one to be exalted over conumer protection. See *Welsh v. Century Products,* 745 F.Supp. 313, 318-19 (D.Md. 1990) ("the structure of the Safety Act and its legislative history disclose no independent purpose to achieve nationwide authority in regulation at the expense of common law causes of action . . . Uniformity in regulation is a goal of the Safety Act only insofar as it promotes safety. Uniformity is not a goal in and of itself; nor is uniformity a goal . . . so that vehicle equipment manufacturers might avoid tort liability"). *See also Buzzard,* 966 F.2d at 782-84.

Petitioners argue that the common law claims frustrate federal law because individual juries will be allowed to apply vehicle design standards that state legislatures or agencies could not. This has traditionally been Congress' approach in the area of consumer protection. *See, e.g., Abbott v. American Cyanamid Co.,* 844 F.2d 1108 (4th Cir. 1988) (Food, Drug and Cosmetic Act did not preempt common law claims); *Ferebee v. Chevron Chem-*

ical Co., 736 F.2d 1529, 1539-43 (D.C. Cir. 1984) (Federal Insecticide, Fungicide nd Rodenticide Act does not preempt common laws tort suits); *Hubbard-Hall Chemical Co. v. Siverman,* 340 F.2d 402 (1st Cir. 1965) (same as *Ferebee*); *Raymond v. Riegal Textile Corporation,* 484 F.2d 1025 (1st Cir. 1973) (Flammable Fabrics Act does not preempt common law claims); *see also* 29 U.S.C. §2074 (Consumer Product Safety Act does not preempt common law liability); *Cipollone,* 112 S.Ct. at 2628 n.2 (opinion of Blackmun, J.); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984).

Petitioners "conflict" preemption argument urges "[a] freewheeling judicial inquiry into whether a state [claim] is in tension with federal objectives [which] undercut[s] the principle that it is Congress rather than the courts that preempts state law." *Gade,* 112 S.Ct. at 2390 (Kennedy, J., concurring). If a court claims to be analyzing congressional intent, but simply considers the general purpose of the federal statute instead of addressing the specific intent of Congress to displace the states, such reasoning is in conflict with the reservation of police powers to the states. Congressional "intent" in such cases is analyzed as if the states did not exist, and the state law is then placed in opposition to that intent. Petitioners are actually arguing that conflict preemption should apply regardless of what Congress intended and expressly stated. However, the Supremacy Clause, by its own terms, operates not in spite of, but through congressional enactments. Petitioners' reasoning ignores the presumption that state common law is not to be superseded unless Congress clearly intends it to be. Such reasoning presupposes that a conflict arises whenever state law and federal law deal with substantially similar subject matter. On the contrary, "[t]here is no general inherent conflict between federal preemption of

state [motor vehicle safety standards] and the continued vitality of state common law damage actions." *Cipollone,* 112 S.Ct. at 2618.

In the present case, the Eleventh Circuit's decision does not deal directly with the "conflict" preemption argument, apparently on the basis that *Cipollone* foreclosed conflict analysis.[10] However, the court did deal with that issue in another preemption case. In *Lake Aircraft,* plaintiff contended that his airplane passenger seat lacked a proper "energy attenuating" mechanicsm to absorb crash forces. 992 F.2d at 292. The court examined the relevant federal regulations and determined that "although federal regulations recognized energy absorbing features as design options, no provision required that aircraft seats contain an energy absorbing device to be certified as 'airworthy.' " *Id.* at 294. Following *Cipollone,* the court held that Congress did not intend to preempt plaintiff's claims. *Id.* at 295. The court then addressed the issue of "conflict" preemption and determined that the case presented no actual conflict. The court found that there is no actual state/federal conflict where federal design regulations permit but do not require manufacturers to use certain designs. 992 F.2d at 295 n.5.

There is no difference between the claims in *Lake Aircraft* and the claims in the present case. Standard 121 did not require but did permit manufacturers to use antilock brakes.[11] An airbrake system with antilock

[10] However the "conflict" preemption argument was Petitioners' main contention on petition for rehearing and suggestion for rehearing *en banc* which were summarily denied. Pet. App. 49a.

[11] Respondents' claims do not involve a choice between antilock brakes or airbrakes as stated in Judge Hill's dissent. Slip op. [footnote continued]

devices (permitted by Standard 121) is a safer braking system than the one required by the minimum standards of the Safety Act, just as a seat with proper energy absorbing features (permitted under the federal aviation standards) is a safer seat than the one required by the minimum standards of the FAA.

Regardless of whether a "more robust view of the scope of 'express preemption' " is applied to this case, the language, legislative history, statutory context, and purpose of the Safety Act demonstrate that Respondents' claims are not preempted. There is no basis for further review.

at 1189. Antilock systems are part of a service brake system that automatically controls wheel slip during braking. Air brake systems relate to transmitting pressure from the driver's brake to the service brake. *See* 49 C.F.R. §571.121 S4. Definitions. Plaintiffs' claims have no effect on the air brake requirements; defendants should have installed antilock brakes in addition to meeting the air brake requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. CARTER
(Counsel of Record)
RAYMOND T. BROOKS, JR.
THE CARTER FIRM
P.O. Box 509
Madison, Georgia 30650
(706) 342-4722

CHARLES A. MATHIS, JR.
MATHIS, JORDAN
AND ADAMS, P.C.
425 South Wayne Street
Milledgeville, Georgia 31061
(912) 453-9387

ALLAN R. ROFFMAN
LAMBERT AND ROFFMAN
P.O. Box 169
Madison, Georgia 30650
(706) 342-3566
Attorneys for Respondents.